

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NORTHEAST MEDICAL SERVICES, INC.,

No. C 12-2895 CW

Plaintiff,

ORDER GRANTING  
FEDERAL

v.

DEFENDANTS' MOTION  
TO DISMISS (Docket  
No. 30); GRANTING  
IN PART STATE  
DEFENDANTS' MOTION  
TO DISMISS (Docket  
No. 29).

CALIFORNIA DEPARTMENT OF  
HEALTHCARE SERVICES, et al.,

Defendants.

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Plaintiff Northeast Medical Services, Inc. (NEMS) brings this action for declaratory and injunctive relief against Defendants U.S. Department of Health and Human Services (HHS), HHS Secretary Kathleen Sebelius, California Department of Health Care Services (DHCS), DHCS Director Toby Douglas, and California Health and Human Services Agency (HHSA). Federal Defendants HHS and Sebelius move to dismiss for lack of subject matter jurisdiction and failure to state a claim. State Defendants DHCS, Douglas, and HHSA move separately to dismiss on the same grounds. After considering all of the parties' submissions and oral argument, the Court grants Federal Defendants' motion to dismiss and grants in part and denies in part State Defendants' motion to dismiss.

BACKGROUND

NEMS is a non-profit health center that offers medical care to the "poor and medically-underserved populations of the San Francisco Bay Area." Docket No. 1, Compl. ¶¶ 19-20. It currently serves over thirty-five thousand patients and conducts nearly two-hundred thousand patient visits per year. Id.

1 For the past four decades, NEMS has received federal funding  
2 under § 330 of the Public Health Services Act. 42 U.S.C. § 254b;  
3 Compl. ¶ 19. Under that provision, NEMS is required to provide  
4 medical services to communities with limited health care access  
5 and may not refuse services to any person based on that person's  
6 inability to pay. Id. ¶¶ 1-2; 42 U.S.C. § 254b(a)(1). As a  
7 further condition of its funding, NEMS must also provide services  
8 to any person enrolled in Medicaid. 42 U.S.C. § 254b(k)(3).

9 Medicaid is a federal program that offers participating  
10 states financial assistance to provide medical services to the  
11 poor. Cal. Welf. & Inst. Code § 10740; Compl. ¶ 22. While states  
12 "do not have to participate in Medicaid, . . . those that choose  
13 to do so 'must comply both with statutory requirements imposed by  
14 the Medicaid Act and with regulations promulgated by the Secretary  
15 of [HHS].'" Managed Pharmacy Care v. Sebelius, 2012 WL 6204214,  
16 at \*2 (9th Cir.) (citations omitted). One of these requirements  
17 is that participating states reimburse federally-qualified health  
18 centers for the services they provide to Medicaid enrollees. 42  
19 U.S.C. § 1396a(a)(15). Thus, federally-qualified health centers,  
20 like NEMS, typically receive funding from both the federal  
21 government (under the Public Health Services Act) and the State  
22 (under the Medicaid Act).

23 California participates in Medicaid through its Medi-Cal  
24 program. Cal. Welf. & Inst. Code § 10740; Compl. ¶ 22. It is  
25 therefore required to reimburse NEMS for the organization's costs  
26 in providing care to Medicaid enrollees. 42 U.S.C. § 1396a(bb);  
27 Compl. ¶¶ 3-5. It provides these reimbursements through a  
28 "managed care organization" called the San Francisco Health Plan

(SFHP), with which the State has contracted to help administer Medi-Cal in the San Francisco area. Compl. ¶¶ 3, 77-79. SFHP provides NEMS with regular payments that are meant to estimate NEMS's prospective costs for treating Medicaid enrollees for the upcoming fiscal year. Id. ¶¶ 60-61. At the end of every fiscal year, NEMS is required to report its actual costs to DHCS, the agency tasked with administering Medi-Cal, so that the agency can determine whether the SFHP's prospective payments fully compensated NEMS for its Medicaid-related costs that year. Id. ¶¶ 58-59, 85; 42 U.S.C. § 1396a(bb)(5). If the report reveals that SFHP's prospective payments exceeded NEMS's actual Medicaid costs for the year, then NEMS must return any excess funding it received to DHCS. Compl. ¶¶ 58-59. If the report shows that SFHP's payments fell short of NEMS's actual costs for the year, then DHCS must make up the shortfall by paying NEMS the difference. Id. This process, which the Medicaid Act requires all federally-qualified health centers to complete, is known as the annual "reconciliation." Id. ¶ 85.<sup>1</sup>

In May 2011, NEMS learned that the U.S. Attorney's office for the Northern District of California had opened an investigation

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<sup>1</sup> The annual reconciliation process is described in the Medicaid Act as follows:

In the case of services furnished by a Federally-qualified health center or rural health clinic pursuant to a contract between the center or clinic and a managed care entity (as defined in section 1396u-2(a)(1)(B) of this title), the State plan shall provide for payment to the center or clinic by the State of a supplemental payment equal to the amount (if any) by which the amount determined under paragraphs (2), (3), and (4) of this subsection exceeds the amount of the payments provided under the contract.

42 U.S.C. § 1396a(bb)(5).

1 into whether NEMS had knowingly reported false information to DHCS  
2 on its annual reconciliation reports. Id. ¶¶ 88, 91. The  
3 investigation focused on whether NEMS had violated the federal  
4 False Claims Act (FCA), 31 U.S.C. § 3729, by under-reporting the  
5 amount of payments it received from SFHP so that it could recoup  
6 larger reconciliation payments from DHCS. Compl. ¶¶ 88-94. NEMS  
7 learned of the investigation when it was served with a Civil  
8 Investigative Demand by HHS that month. Id. ¶ 88.

9 In response to the Civil Investigative Demand, NEMS has  
10 produced thousands of documents to the U.S. Attorney's office and  
11 met several times with HHS and DHCS representatives to answer  
12 questions about its financial record-keeping. Id. ¶¶ 89-92.  
13 During a conference call with HHS and the U.S. Attorney's office  
14 on February 9, 2012, NEMS learned "for the first time" that the  
15 United States was considering intervening in a qui tam action that  
16 had previously been filed against NEMS in this district. Id.  
17 ¶ 93. That action, which was filed under seal on May 3, 2010,  
18 charges NEMS with violations of both the FCA, 31 U.S.C. § 3729,  
19 and the California False Claims Act, Cal. Gov't Code §§ 12650 et  
20 seq., and seeks treble damages and civil penalties. See United  
21 States & State of California ex rel. Trinh v. Northeast Med.  
22 Servs., Case No. 10-1904-CW, Docket No. 1, at 1.

23 On April 9, 2012, an Assistant U.S. Attorney (AUSA) sent NEMS  
24 a letter stating that the government's preliminary review of  
25 NEMS's annual reconciliation reports "supports the allegations  
26 made in the qui tam action." Compl., Ex. 2, at 2. The AUSA's  
27 letter described how NEMS had apparently received over twenty-  
28 seven million dollars in Medicaid-related payments from SFHP

1 between 2005 and 2010 but only reported receiving thirteen million  
2 dollars from SFHP on its annual reconciliation reports to DHCS.  
3 Id. This under-reporting, according to the letter, allowed NEMS  
4 to recoup nearly fifteen million dollars in overpayments from DHCS  
5 during that period. Id. The letter concluded that "NEMS could be  
6 liable under the False Claims Act" and invited NEMS to discuss the  
7 issue further in settlement negotiations. Id. It also noted that  
8 the federal government would soon be deciding whether or not to  
9 intervene in the qui tam action. Id.

10 In addition to describing the results of its initial  
11 investigation, the government expressly rejected NEMS's proffered  
12 reasons for declining to report receipt of the full SFHP payments  
13 to DHCS. Id. Previously, in a January 2012 letter to the U.S.  
14 Attorney, NEMS had expressed the view that it was not statutorily  
15 obliged to report all of the funds that it received from SFHP to  
16 DHCS. Compl., Ex. 1, at 1-3. Rather, it argued, the Medicaid Act  
17 permitted it to report only a portion of the funds it received  
18 from SFHP. Id. The AUSA's April 2012 letter explained why the  
19 federal government did not agree with NEMS's interpretation of the  
20 Medicaid Act's financial reporting requirements. Id., Ex. 2, at  
21 1-2.

22 On April 12, 2012, three days after receiving the AUSA's  
23 letter, NEMS notified the U.S. Attorney that it had not changed  
24 its position and "had no settlement to propose." Id. ¶ 95. The  
25 U.S. Attorney's office thus ceased its settlement efforts and  
26 continued its investigation of NEMS. Id. ¶¶ 96-98. NEMS, in  
27 turn, filed its annual reconciliation report for fiscal year 2011  
28 on May 31, 2012. Id. ¶¶ 15, 99. NEMS asserts that it filed the

1 report "in a manner consistent with its past practice" but  
2 notified DHCS that its interpretation of its reporting  
3 requirements differed from the interpretation that the U.S.  
4 Attorney had recently articulated in its April 9 letter. Id.  
5 ¶ 15.

6 On June 4, 2012, less than a week after filing its  
7 reconciliation report, NEMS filed this lawsuit. In its complaint,  
8 NEMS requests:

- 9 (1) a judicial declaration that "the legal conclusions and  
10 positions (including that of the relator in the above-  
11 described qui tam action) expressed in the AUSA's letter are  
12 unsupported by any (properly promulgated) rule or regulation,  
13 are a departure from existing policy on the substantive  
14 rights of Section 330 health centers, and contrary to law,"  
15 id. ¶ 127;
- 16 (2) a judicial declaration that NEMS's own proposed  
17 interpretation of the statutory reporting requirements for  
18 federally-qualified health centers is correct, id. ¶¶ 128-31;
- 19 (3) an order directing Defendants to "implement a payment system  
20 (including past and future payments)" that comports with  
21 NEMS's interpretation of federal law, id. ¶ 131;
- 22 (4) attorneys' fees and costs, id. ¶ 133; and
- 23 (5) "such other and further relief as the Court deems warranted  
24 or just," id. ¶ 134.

25 On July 25, 2012, the Court related this case to the pending  
26 qui tam action against Plaintiff. Docket No. 28. One week later,  
27 on August 2, the United States filed its notice of election to  
28

1 intervene in that action. On August 6, 2012, Defendants filed  
2 their motions to dismiss in this case.

3 Five months later, on January 4, 2013, the State of  
4 California filed its notice of election to intervene in the qui  
5 tam action. On January 15, 2013, the United States and the State  
6 of California filed their joint complaint-in-intervention in that  
7 case, charging NEMS with "knowingly submitt[ing] false  
8 reconciliation reports" to DHCS in violation of the FCA and  
9 California False Claims Act. Docket No. 26 in Case No. 10-1904.

#### 10 LEGAL STANDARDS

##### 11 I. Subject Matter Jurisdiction

12 Dismissal is appropriate under Rule 12(b)(1) when the  
13 district court lacks subject matter jurisdiction over the claim.  
14 Fed. R. Civ. P. 12(b)(1). Federal subject matter jurisdiction  
15 must exist at the time the action is commenced. Morongo Band of  
16 Mission Indians v. Cal. State Bd. of Equalization, 858 F.2d 1376,  
17 1380 (9th Cir. 1988). Subject matter jurisdiction is a threshold  
18 issue which goes to the power of the court to hear the case.  
19 Therefore, a Rule 12(b)(1) challenge should be decided before  
20 other grounds for dismissal, because they will become moot if  
21 dismissal is granted. Alvares v. Erickson, 514 F.2d 156, 160 (9th  
22 Cir. 1975).

23 A federal court is presumed to lack subject matter  
24 jurisdiction until the contrary affirmatively appears. Stock  
25 West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.  
26 1989). An action should not be dismissed for lack of subject  
27 matter jurisdiction without giving the plaintiff an opportunity to  
28 amend unless it is clear that the jurisdictional deficiency cannot

1 be cured by amendment. May Dep't Store v. Graphic Process Co.,  
2 637 F.2d 1211, 1216 (9th Cir. 1980).

3 II. Failure to State a Claim

4 A complaint must contain a "short and plain statement of the  
5 claim showing that the pleader is entitled to relief." Fed. R.  
6 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to  
7 state a claim, dismissal is appropriate only when the complaint  
8 does not give the defendant fair notice of a legally cognizable  
9 claim and the grounds on which it rests. Bell Atl. Corp. v.  
10 Twombly, 550 U.S. 544, 555 (2007). In considering whether the  
11 complaint is sufficient to state a claim, the court will take all  
12 material allegations as true and construe them in the light most  
13 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d  
14 896, 898 (9th Cir. 1986). However, this principle is inapplicable  
15 to legal conclusions; "threadbare recitals of the elements of a  
16 cause of action, supported by mere conclusory statements," are not  
17 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)  
18 (citing Twombly, 550 U.S. at 555).

19 When granting a motion to dismiss, the court is generally  
20 required to grant the plaintiff leave to amend, even if no request  
21 to amend the pleading was made, unless amendment would be futile.  
22 Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911  
23 F.2d 242, 246-47 (9th Cir. 1990). In determining whether  
24 amendment would be futile, the court examines whether the  
25 complaint could be amended to cure the defect requiring dismissal  
26 "without contradicting any of the allegations of [the] original  
27 complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th  
28 Cir. 1990).



## DISCUSSION

## I. Plaintiff's Legal Claims

Plaintiff asserts three causes of action in its complaint. The first and third causes of action essentially allege that the AUSA's letter mischaracterizes Plaintiff's financial reporting obligations and propounds an invalid interpretation of the Medicaid Act. Compl. ¶¶ 115-18, 124-26. The second cause of action alleges that DHCS has violated the Medicaid Act by failing to provide Plaintiff with timely reimbursements for the organization's costs in serving Medicaid enrollees. Compl. ¶¶ 119-23.

Although Plaintiff asserts in its opposition brief that the "allegations in the Complaint are (with certain exceptions obvious from the text) directed toward and applicable to both (federal and State) sets of defendants," Opp. Fed. Defs.' Mot. Dismiss 1, its complaint does not delineate clearly which claims are asserted against which Defendants. In particular, it is not clear whether Plaintiff's first and third causes of action are directed at both State and Federal Defendants or only at Federal Defendants. See, e.g., Compl. ¶¶ 124-26 (referring to "defendants" generally without further specification). In light of this ambiguity, the Court assumes that Plaintiff's first and third causes of action are directed at both sets of Defendants and that its second cause of action is directed exclusively at State Defendants.

## II. Subject Matter Jurisdiction

## A. Claims Against Federal Defendants

Plaintiff seeks a judicial declaration that the federal government's interpretation of the financial reporting

1 requirements for federally-qualified health centers, as expressed  
2 in the AUSA's letter, is "contrary to law." Compl. ¶¶ 117, 127.  
3 It has sought review of the AUSA's letter under the Administrative  
4 Procedure Act (APA), 5 U.S.C. § 704. Federal Defendants argue  
5 that the Court lacks subject matter jurisdiction over Plaintiff's  
6 claims because the AUSA's letter is not subject to judicial  
7 review.

8 Under the APA, a federal court may only review an agency  
9 action if (1) a statute expressly provides for judicial review of  
10 that action or (2) the agency's action is "final" in nature.  
11 5 U.S.C. § 704. Thus, unless judicial review is statutorily  
12 authorized, "finality is a jurisdictional requirement to obtaining  
13 judicial review under the APA." Fairbanks Northstar Borough v.  
14 U.S. Army Corps of Eng'rs, 543 F.3d 586, 591 (9th Cir. 2009).

15 "For an agency action to be final, the action must (1) 'mark  
16 the consummation of the agency's decisionmaking process' and  
17 (2) 'be one by which rights or obligations have been determined,  
18 or from which legal consequences will flow.'" Oregon Natural  
19 Desert Ass'n v. U.S. Forest Serv., 465 F.3d 977, 982 (9th Cir.  
20 2006) (citing Bennett v. Spear, 520 U.S. 154, 178 (1997)). This  
21 inquiry requires the court to make a pragmatic consideration of  
22 the effect of the challenged action -- not just its label. Id. at  
23 985. The finality requirement is satisfied only when an agency  
24 action imposes an obligation, denies a right, or fixes some legal  
25 relationship as the consummation of the administrative process.  
26 Id. at 986-87. "An agency action may be final if it has a 'direct  
27 and immediate . . . effect on the day-to-day business' of the  
28 subject party." Id. at 987 (alteration in original).

1 Here, Plaintiff asserts that the AUSA's letter constitutes a  
2 "sufficiently final agency action to be judicially reviewable."  
3 Compl. ¶ 101. It argues that the letter represents "HHS's current  
4 view" as to how federally-qualified health centers, like  
5 Plaintiff, are supposed to file their annual reconciliation  
6 reports. Id. In addition, Plaintiff contends that the letter's  
7 effects are "direct and immediate" because it instilled in  
8 Plaintiff the "well-founded fear that the state and/or federal  
9 government will enforce the positions and interpretations stated  
10 therein." Id. ¶ 112.

11 Even assuming that the AUSA's letter actually constitutes  
12 action by HHS -- something the parties dispute here -- it does not  
13 satisfy the APA's finality requirement. The letter, which merely  
14 summarizes the preliminary findings of the U.S. Attorney's FCA  
15 investigation, does not affect Plaintiff's legal rights or  
16 obligations. It uses noncommittal language, noting that the  
17 government's initial review of Plaintiff's financial records  
18 "seems to indicate" that Plaintiff falsified its reconciliation  
19 reports and that this conduct "appears to violate" the FCA.  
20 Compl., Ex. 2, at 2 (emphasis added); see also id. ("It appears  
21 NEMS could be liable under the [FCA]." (emphasis added)).  
22 Plaintiff itself acknowledges in its complaint that the letter  
23 uses "uncertain language" in describing the potential scope of its  
24 FCA liability. Compl. ¶ 94.

25 Furthermore, the letter makes clear that it is an invitation  
26 to settlement negotiations rather than a formal declaration of  
27 sanctions or penalties. Indeed, the subject line reads, in bold  
28 letters: "FOR SETTLEMENT PURPOSES ONLY." Id. The letter also

1 states, again in bold print, that the government's deadline for  
2 intervening in the pending qui tam action is July 2, 2012,  
3 indicating that any formal enforcement efforts would not begin, if  
4 at all, for another three months. Id. All of these elements  
5 demonstrate that the AUSA's letter was "of a merely tentative or  
6 interlocutory nature" and, thus, not subject to judicial review  
7 under the APA. See Bennett, 520 U.S. at 178; cf. N.J. Hosp. Ass'n  
8 v. United States, 23 F. Supp. 2d 497, 500-01 (D.N.J. 1998)  
9 (holding that FCA settlement letters sent by the Department of  
10 Justice did not constitute final agency action because the  
11 "settlement letters merely indicate a belief by the DOJ that  
12 plaintiff's member hospitals may have violated the Medicare Act"  
13 (emphasis added)).

14 Plaintiff seeks to analogize this case to Sackett v. EPA, 132  
15 S. Ct. 1367 (2012). In Sackett, the Supreme Court held that a  
16 pair of residential property owners could challenge a "compliance  
17 order" that the EPA issued instructing them to bring their  
18 property into compliance with the Clean Water Act. Id. at 1371.  
19 The Court concluded that the order qualified as a "final" agency  
20 action because its findings were not subject to further agency  
21 review and because the order imposed a binding "legal obligation"  
22 upon the plaintiffs -- namely, to comply with the order or face  
23 "double penalties in a future enforcement proceeding." Id. at  
24 1371-72.

25 In contrast, the findings in the AUSA's letter here were not  
26 only subject to further agency review but also had no impact on  
27 Plaintiff's legal obligations. In fact, the letter itself stated  
28 that the government was still considering whether or not its

1 investigatory findings ultimately justified intervention in the  
2 qui tam action. In short, the letter was merely speculative and  
3 carried no guarantee of future enforcement activity. As such, it  
4 falls outside the ambit of APA finality and is not subject to  
5 judicial review. See Reliable Automatic Sprinkler Co., Inc. v.  
6 Consumer Prod. Safety Comm'n, 324 F.3d 726, 732 (D.C. Cir. 2003)  
7 ("[T]he Commission's actions here, which are merely investigatory  
8 and clearly fall short of filing an administrative complaint, are  
9 not final agency action. No legal consequences flow from the  
10 agency's conduct to date, for there has been no order compelling  
11 [the plaintiff] to do anything.").

12 The Court therefore dismisses all claims against Federal  
13 Defendants for lack of subject matter jurisdiction. Because the  
14 United States has now filed its complaint in the qui tam action --  
15 and thus commenced an actual enforcement proceeding -- Plaintiff  
16 may amend its claims for declaratory relief and raise them as  
17 counterclaims in that action.

#### 18 B. Claims Against State Defendants

19 State Defendants argue that Plaintiff has failed to establish  
20 both that it has standing and that its claims are ripe. These  
21 arguments are addressed in turn.

##### 22 1. Standing

23 Because challenges to standing implicate a federal court's  
24 subject matter jurisdiction under Article III of the U.S.  
25 Constitution, they are properly raised in a motion to dismiss  
26 under Rule 12(b)(1). White v. Lee, 227 F.3d 1214, 1242 (9th Cir.  
27 2000). To establish standing, a plaintiff must show: "(1) he or  
28 she has suffered an injury in fact that is concrete and

1 particularized, and actual or imminent; (2) the injury is fairly  
 2 traceable to the challenged conduct; and (3) the injury is likely  
 3 to be redressed by a favorable court decision." Salmon Spawning &  
 4 Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir.  
 5 2008).

6 A concrete injury is one that is "'distinct and palpable  
 7 . . . as opposed to merely abstract.'" Schmier v. U.S. Court of  
 8 Appeals for 9th Circuit, 279 F.3d 817, 821 (9th Cir. 2002)  
 9 (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)). The  
 10 "injury must have actually occurred or must occur imminently;  
 11 hypothetical, speculative or other 'possible future' injuries do  
 12 not count in the standings calculus." Schmier, 279 F.3d at 821  
 13 (citing Whitmore, 495 U.S. at 155). "Standing is determined by  
 14 the facts that exist at the time the complaint is filed." Clark  
 15 v. City of Lakewood, 259 F.3d 996, 1006 (9th Cir. 2001).

16 In the present case, Plaintiff appears to identify two  
 17 possible sources of legal harm in its complaint. First, in a  
 18 section of its complaint entitled, "Harm to NEMS," it asserts,

19 The harm or hardship that makes this dispute ripe for  
 20 review is not that NEMS faces a qui tam action or the  
 21 prospect of having to defend itself against some other  
 22 enforcement action . . . , but rather the compliance  
 23 dilemma it faces as a result of an AUSA's letter  
 24 purporting to give an authoritative interpretation of  
 25 statutory and regulatory provisions that have a direct,  
 26 immediate, and harmful effect on NEMS' current and  
 27 future operations.

28 Compl. ¶ 100 (repeating text almost verbatim from ¶ 14). Second,  
 in a later section of its complaint, Plaintiff alleges that State  
 Defendants have failed to make timely reconciliation payments as  
 required by the Medicaid Act. Id. ¶¶ 122-23. Of these two

1 asserted injuries, only the latter is sufficient to confer  
2 standing here.

3       The first injury that Plaintiff alleges -- the "compliance  
4 dilemma" created by the AUSA's letter -- is not fairly traceable  
5 to State Defendants because Plaintiff has not alleged that DHCS or  
6 HHSA played any role in drafting the AUSA's letter. Moreover,  
7 even if Plaintiff had included such allegations in its complaint,  
8 the injury Plaintiff asserts is still too abstract to support  
9 standing here. To establish standing based on a compliance  
10 dilemma, a plaintiff must allege that the government's conduct has  
11 presented it with an "immediate dilemma to choose between  
12 complying with newly imposed, disadvantageous restrictions and  
13 risking serious penalties for violation." Hemp Indus. Ass'n v.  
14 Drug Enforcement Agency, 333 F.3d 1082, 1086 (9th Cir. 2003)  
15 (emphasis added; citations and quotation marks omitted). Here,  
16 however, Plaintiff has not alleged that it faced any immediate  
17 penalties or consequences for noncompliance. In fact, Plaintiff  
18 expressly denies that any such consequences are the motivating  
19 factor behind this lawsuit. It states in its complaint that the  
20 "harm or hardship that makes this dispute ripe for review is not  
21 that NEMS faces a qui tam action or the prospect of having to  
22 defend itself against some other enforcement action." Compl.  
23 ¶ 100 (repeating text almost verbatim from ¶ 14) (emphasis added).  
24 Thus, as currently plead, Plaintiff's "compliance dilemma" cannot  
25 constitute an injury-in-fact because Plaintiff has expressly  
26 declined to rely upon whatever harm it might face as a consequence  
27 of its noncompliance.  
28

1       The second injury that Plaintiff has asserted -- the State's  
 2 failure to make timely reconciliation payments -- is more  
 3 concrete. The Medicaid Act requires participating states to  
 4 reimburse federally-qualified health centers every four months for  
 5 the services they provide to Medicaid enrollees. 42 U.S.C.  
 6 § 1396a(bb)(5)(B); see also Three Lower Counties Cmty. Health  
 7 Servs. v. Maryland, 498 F.3d 294, 301-03 (4th Cir. 2007) ("[T]he  
 8 statute plainly provides that a State must make fully compensatory  
 9 supplemental payments no less frequently than every four  
 10 months."). Because Plaintiff's complaint alleges that DHCS has  
 11 "continuously and consistently failed to make fully compensatory  
 12 supplemental payments on the schedule" required by the Medicaid  
 13 Act, it has identified a cognizable legal injury here:  
 14 specifically, that DHCS has "deprive[d] NEMS of its right to full  
 15 and timely reimbursement." Id. ¶¶ 122-23. This injury, which is  
 16 directly traceable to the conduct of State Defendants, is  
 17 sufficient to support standing here for Plaintiff's second cause  
 18 of action for declaratory relief.<sup>2</sup>

19       State Defendants contend that DHCS's practice of making  
 20 interim prospective payments to NEMS satisfies the Medicaid Act's  
 21 four-month payment requirement. The language of the statute,  
 22 however, makes clear that federally-qualified health centers are  
 23 entitled to fully compensatory payments every four months. 42

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24  
 25       <sup>2</sup> Plaintiff spends several pages of its opposition brief, which was  
 26 filed on September 13, 2012, arguing that it will be injured if State  
 27 Defendants fail to make a reconciliation payment by September 30, 2012.  
 28 This injury cannot support standing here because it did not exist at the  
 time the complaint was filed. See Clark, 259 F.3d at 1006.  
 Nevertheless, because Plaintiff's complaint alleges that DHCS's  
 violation of the Medicaid Act is ongoing, Plaintiff has identified a  
 cognizable injury-in-fact here.



1 U.S.C. § 1396a(bb)(5)(B) (requiring the State to make "a  
2 supplemental payment equal to the amount" by which the health  
3 center's actual costs exceed the amount of funding received from  
4 the State (emphasis added)). Relying on this language, the Fourth  
5 Circuit has specifically rejected State Defendants' argument here.  
6 Three Lower Counties, 498 F.3d at 301, 303 ("Even though the  
7 partial interim payment is made with the frequency required by the  
8 statute, it does not fulfill the statutory requirement of full  
9 compensation because the reconciliation payment comes a full six  
10 to nine months after the end of the applicable quarter.").

11 Accordingly, State Defendants' motion to dismiss Plaintiff's  
12 second cause of action is denied. Because Plaintiff has not  
13 identified an injury-in-fact sufficient to support standing for  
14 its first and third causes of action, State Defendants' motion to  
15 dismiss those causes of action is granted. Plaintiff is granted  
16 leave to amend those claims by raising them as counterclaims in  
17 the pending qui tam action.

18 B. Ripeness

19 Like standing, ripeness pertains to a federal court's subject  
20 matter jurisdiction and is properly raised in a Rule 12(b)(1)  
21 motion to dismiss. Chandler v. State Farm Mut. Auto. Ins. Co.,  
22 598 F.3d 1115, 1122 (9th Cir. 2010) (citations omitted). A  
23 "claim is not ripe for adjudication if it rests upon contingent  
24 future events that may not occur as anticipated, or indeed may not  
25 occur at all.'" Bova v. City of Medford, 564 F.3d 1093, 1095 (9th  
26 Cir. 2009) (quoting Texas v. United States, 523 U.S. 296, 300  
27 (1998)). The Ninth Circuit has recognized that ripeness often  
28

1 "coincides squarely with standing's injury in fact prong." Bova,  
2 564 F.3d at 1095 (quotations and citations omitted).

3 Plaintiff's first and third causes of action are not ripe  
4 because, as explained above, Plaintiff has not identified a  
5 cognizable injury-in-fact to support standing for those claims.  
6 Plaintiff's second cause of action, however, is ripe because it is  
7 based on an injury that Plaintiff alleges is ongoing -- namely,  
8 State Defendants' failure to make timely reimbursement payments.

9 III. Failure to State a Claim

10 As noted above, the Court lacks subject matter jurisdiction  
11 over all of Plaintiff's claims against Federal Defendants and over  
12 Plaintiff's first and third causes of action against State  
13 Defendants. Accordingly, there is no need to address whether  
14 these claims must be dismissed under Rule 12(b)(6).

15 Plaintiff's only surviving cause of action is its claim  
16 against State Defendants for their failure to make timely  
17 reimbursement payments as required by the Medicaid Act. At least  
18 two circuits have recognized that a federally-qualified health  
19 center can bring such an action under 42 U.S.C. § 1983 to enforce  
20 its right to timely reconciliation payments. Three Lower  
21 Counties, 498 F.3d at 303 ("At bottom, we conclude that the  
22 Medicaid Act requires Maryland to pay FQHCs fully compensatory  
23 supplemental payments not less frequently than four months after  
24 Maryland has received the claim for supplemental payment, as  
25 required by 42 U.S.C. § 1396a(bb)(5)."); Rio Grande Community  
26 Health Ctr., Inc. v. Rullan, 397 F.3d 56, 75 (1st Cir. 2005) ("We  
27 conclude that a private action can be brought by an FQHC under  
28 section 1983 to enforce 42 U.S.C. § 1396a(bb)."); see also Pee Dee

1 Health Care, P.A. v. Sanford, 509 F.3d 204, 210-11 (4th Cir. 2007)

2 ("This court has also allowed a healthcare provider to pursue a

3 § 1983 action to enforce § 1396a(bb)(5) of the Medicaid Act.").

4 Other circuits have permitted federally-qualified health centers

5 to bring claims for violations of similar Medicaid Act provisions.

6 See, e.g., Cmty. Health Ctr. v. Wilson-Coker, 311 F.3d 132, 136

7 (2d Cir. 2002) (permitting § 1983 claim against a state agency for

8 failing to provide adequate reimbursement payments in violation of

9 42 U.S.C. § 1396a(bb)(2)). These cases make clear that Plaintiff

10 has stated a claim here by alleging that State Defendants have

11 violated the Medicaid Act by failing to provide timely

12 reimbursements.<sup>3</sup>

13 IV. Eleventh Amendment Immunity

14 State Defendants contend that, under the Eleventh Amendment,

15 DHCS and HHSA are immune from suit and cannot be subject to an

16 injunction or forced to pay monetary damages. Further, they

17 contend that DHCS Director Douglas is immune from suit because he

18 "does not have any enforcement authority that potentially could be

19 implicated based on the facts alleged in this lawsuit." State

20 Defs.' Mot. Dismiss 13.

21 Plaintiff appears to concede that its claims against DCHS and

22 HHSA are barred and that it may not recover damages for State

23 Defendants' past conduct. Its opposition brief does not address

24 State Defendants' argument that DHCS and HHSA are immune and, at

25 oral argument, it stated that it is only seeking "compliance going

26

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27 <sup>3</sup> Although Plaintiff does not invoke § 1983 in the section of its

28 complaint alleging violations of the Medicaid Act, it does cite the

provision in an earlier section of the complaint. See Compl. ¶ 18.

1 forward" rather than damages for past Medicaid Act violations.  
2 Docket No. 44, Hr'g Tr. 14:11-:12.<sup>4</sup> In short, Plaintiff seems to  
3 recognize that its claims against DHCS and HHSA are precluded by  
4 the Eleventh Amendment and that damages for past conduct are not  
5 available. See generally Puerto Rico Aqueduct and Sewer Authority  
6 v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (stating that  
7 the Ex Parte Young exception to Eleventh Amendment immunity  
8 "applies only to prospective relief, does not permit judgments  
9 against state officers declaring that they violated federal law in  
10 the past, and has no application in suits against the States and  
11 their agencies, which are barred regardless of the relief sought"  
12 (citations omitted)).

13 Plaintiff does, however, claim that Douglas has the requisite  
14 authority to ensure DHCS's future compliance with the Medicaid  
15 Act's reimbursement provisions. It notes that Douglas has been  
16 sued here in his official capacity as director of DHCS, which is  
17 the agency responsible for administering the Medicaid program in  
18 California. See Compl. ¶¶ 22-23. As DHCS director, Douglas  
19 oversees the agency's practice of making reconciliation payments  
20 to federally-qualified health centers like Plaintiff. Cal. Welf.  
21 & Inst. Code §§ 14001.11; 14132.100. Accordingly, he has been  
22 properly sued here and Plaintiff's claim against him is not barred  
23 by the Eleventh Amendment.

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24  
25  
26 <sup>4</sup> Plaintiff also noted at the hearing that it is currently  
27 challenging "the way in which the state says the Eleventh Amendment  
28 would apply here" before the Ninth Circuit in another case. Hr'g Tr.  
14:15-:21. The Ninth Circuit has yet to hear argument in that case.  
See North East Med. Servs., Inc. v. Cal. Dep't Health Care Servs., Case  
No. 11-16795 (9th Cir. appeal filed July 21, 2011).

## CONCLUSION

For the reasons set forth above, Federal Defendants' motion to dismiss (Docket No. 30) is GRANTED and State Defendants' motion to dismiss (Docket No. 29) is GRANTED in part and DENIED in part. In addition, Plaintiff's motion to strike (Docket No. 39) is DENIED as moot because the Court does not rely on the sections of State Defendants' reply brief to which Plaintiff objects.


Plaintiff is granted leave to amend its claims against Federal Defendants by raising them as counterclaims in the related qui tam action. Plaintiff is similarly granted leave to amend its first and third causes of action against DHCS Director Douglas by raising them as counterclaims in the qui tam action. Although Plaintiff may proceed in this action on its remaining claim against Douglas, the Court will consolidate this action with the qui tam action for pre-trial case management purposes, and may consolidate the two cases for trial if it appears that Plaintiff's claim raises the same issues as the qui tam action. If Plaintiff has reason to believe that Douglas' defense to that claim will raise the same issues as the qui tam action, it must raise the claim as a counterclaim in that action, and may do so voluntarily in any event.

Pursuant to the parties' stipulation in the qui tam action, NEMS must file its responsive pleading to the United States and the State of California's complaint-in-intervention by March 1, 2013. If NEMS files a motion to dismiss the complaint-in-intervention, the motion will be heard at 2:00 p.m. on April 11, 2013. A case management conference will be held on that date in both actions, regardless of whether NEMS moves to dismiss in the

1 qui tam action. The parties shall file a joint case management  
2 statement by April 4, 2013.

3 IT IS SO ORDERED.

4  
5 Dated: 2/1/2013

  
CLAUDIA WILKEN  
United States District Judge

United States District Court  
For the Northern District of California